2009

Connie Florez v. Schindler Elevator Corporation : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

CONNIE FLOREZ, Appellee, vs. SCHINDLER ELEVATOR CORPORATION, Appellant.	No. 20090299CA

REPLY BRIEF OF APPELLANT

Appeal From the Second Judicial District Court, Weber County
Case No. 050902302, Honorable Ernie Jones and Brent W. West

VANCOTT, BAGLEY, CORNWALL CORNWALL & MCCARTHY
Scott M. Lilja (4231)
Cassie J. Medura (8290)
36 South State Street, Suite 1900
Salt Lake City, Utah 84111
Telephone: (801) 532-3333
Facsimile: (801) 534-0058
Counsel for Appellants

GRIDLEY WARD & VANDYKE
Erik M. Ward (3380)
Lindy W. VanDyke (8406)
635 25th Street
Ogden, Utah 84401
Telephone: (801) 621-3317
Counsel for Appellees

ORAL ARGUMENT REQUESTED

IN THE UTAH COURT OF APPEALS

CONNIE FLOREZ, Appellee, vs. SCHINDLER ELEVATOR CORPORATION, Appellant.	No. 20090299CA

REPLY BRIEF OF APPELLANT

Appeal From the Second Judicial District Court, Weber County
Case No. 050902302, Honorable Ernie Jones and Brent W. West

VANCOTT, BAGLEY, CORNWALL CORNWALL & MCCARTHY
Scott M. Lilja (4231)
Cassie J. Medura (8290)
36 South State Street, Suite 1900
Salt Lake City, Utah 84111
Telephone: (801) 532-3333
Facsimile: (801) 534-0058
Counsel for Appellants

GRIDLEY WARD & VANDYKE
Erik M. Ward (3380)
Lindy W. VanDyke (8406)
635 25th Street
Ogden, Utah 84401
Telephone: (801) 621-3317
Counsel for Appellees

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

INTRODUCTION

The evidence presented at trial does not support the verdict because the evidence establishes that plaintiff's benign positional paroxysmal vertigo ("BPPV"), the primary symptom of which is dizziness, pre-existed the accident. Plaintiff was diagnosed with vertigo and suffered from the same symptoms, as early as 1996. Once a person has BPPV, the condition is not curable and the fall could not have caused plaintiff's BPPV.

In addition, plaintiff's expert, a sports medicine physician, failed to offer a report containing a conclusion regarding the cause of plaintiff's BPPV. He also lacked any knowledge, skill, education, experience or qualifications in inner ear problems such as BPPV. Plaintiff's expert therefore should not have been permitted to testify regarding the cause of plaintiff's BPPV. Moreover, the trial court erred when it allowed plaintiff's treating physician to testify as to the cause of plaintiff's BPPV.

With respect to damages, plaintiff presented no quantitative evidence of damages. The only testimony presented at trial regarding damages was that plaintiff's treatment was reasonable and that future treatment would be similar to past treatment. No evidence of the cost, duration, frequency or type of treatment was ever admitted. Although counsel now refer to a Summary of Medical Expenses, that proposed exhibit was never presented to the jury, was subject to Schindler's objection under Rule 1006 and did not support plaintiff's damage argument in closing and was, in fact, inconsistent with that argument.

Finally, plaintiff's counsel's opening and closing statements were so riddled with improper and prejudicial comments regarding Schindler, Schindler's counsel and plaintiff, the jury verdict could only have been rendered as a result of passion and prejudice.

I. RESPONSE TO PLAINTIFF'S STATEMENT OF THE CASE

Plaintiff argues that it was improper for Schindler to examine the plaintiff concerning her medical history and that in doing so Schindler invited plaintiff's counsel's objectionable "testimony" as to her credibility and, also, counsel's attacks on Schindler and its counsel. Brief of Appellee at 2-3. In fact plaintiff states:

> Schindler should not be allowed to call into question the credibility and personal veracity of [plaintiff], and then claim reversible error when they find the **testimony** and rebuttal argument made **by counsel** unpalatable.

Brief of Appellee at 3 (emphasis added).

First, assuming Schindler attacked plaintiff's credibility, plaintiff's counsel's admitted "testimony" as to plaintiff's character is not evidence supporting her credibility. Counsel's repeated testimony in closing as to his personal opinion of plaintiff, as opposed to arguing ***evidence*** of her credibility, was improper. Second, attacks unsupported by any evidence against Schindler and its counsel certainly do nothing to support plaintiff's credibility.

Third, it is absurd to argue, as plaintiff does, that it is an "attack [on] the credibility and personal veracity" to examine the plaintiff concerning her medical history. The entirely proper purpose of the examination of plaintiff's medical history and records at trial was to show that the injuries complained of pre-existed the accident. Plaintiff does not and cannot point to a single instance in examination or argument where Schindler made any improper personal "attack" against her. This attempt to justify plaintiff's counsel's improper "testimony" and attacks on Schindler and its counsel is unavailing and should be disregarded by this Court.

Finally, plaintiff asserts that she "submitted" her past and future medical expenses to

the jury. Plaintiff fails to acknowledge that she submitted neither documents nor testimony to establish the amount of ***any*** medical treatment in this case. The only document which plaintiff argues contains information regarding damages based on medical costs is plaintiff's "Summary of Medical Expenses" which was never presented to the jury. Schindler specifically objected to that Summary exhibit both before and at trial because no supporting documentation was ever provided under URE 1006, and, indeed, the summary was not supported by the medical records placed in evidence by Schindler. Even that Summary does not support the damages argued by counsel at closing. Indeed, counsel argued at closing for future medical expenses based on treatment and medications that appeared nowhere in plaintiff's own Summary exhibit and for which there was no evidentiary support whatsoever.

A. Response To Plaintiff's Statement Of Facts Relevant To The Issues Presented For Review.

1. Facts at Issue.

Plaintiff's statement of the facts ignores the uncontroverted medical history and medical records documenting the incident in question. For example, plaintiff asserts that she spent "several hours in the emergency room" suffering from, in counsel's words, "anxiety, nausea, respiratory distress, and fainting." Brief of Appellee at 6. The emergency room record tells a different story. Plaintiff arrived at the emergency room at approximately 2:14. *See* Ex. 42. Plaintiff had no complaints and suffered from no pain, injury, or trauma. *See id.* Plaintiff's EKG and vital signs were normal and she was released at approximately 3:45, approximately 90 minutes after she was admitted. *See id.*

Plaintiff correctly asserts that the Dix-Hallpike maneuver is the primary test to diagnose BPPV. Plaintiff then correctly states that "[a] positive Dix-Halpike causes

nystagmus in the patient's eyes." Brief of Appellee at 8. Plaintiff then, however, erroneously contends that the March 2002 medical record showed that no nystagmus resulted from plaintiff's treatment on that date. *Id.* In fact, that record reflects that the Dix-Hallpike indicated positive for lose canaliths, (canaliths are calcium carbonate crystals normally attached atop a membrane in of the inner ear) that the doctors "IMPRESSIONS" state "Postural vertigo-but not clear cut BPPV" and plaintiff was sent for Canalith Repositioning Treatment ("CRT") that same day. Def. Ex. 30a. That CRT, which involves the same type of maneuvering of the head as the Dix-Hallpike maneuver, did produce nystagmus: "Performed CRT on left side and provoked dizziness and nystagmus." *Id.*; R. 910 p. 456 (Dr. Siddoway's testimony re similarity of CRT and Dix-Hallpike.)

Plaintiff then incorrectly argues that Schindler relied solely on that 2002 record as evidence that plaintiff's BPPV pre-dated the accident, failing to acknowledge plaintiff's 1996 medical record, where plaintiff was diagnosed with vertigo, including nystagmus. Def. Ex. 118. While Dr. Siddoway testified that the 2002 episode was different than the BPPV suffered by plaintiff after the fall, he also testified that, based on the 1996 record, plaintiff suffered from vertigo in 1996. R. 910 p. 460-61. He also referenced the 1996 episode in his record of March 2002. Defendant's Exhibit Binder tab 30a. **Prior to trial, plaintiff did not produce the 1996 record establishing that she suffered from vertigo with the same BPPV symptoms as after the fall.** At trial and now on appeal, plaintiff continues to ignore the record that definitively establishes that she suffered from BPPV as early as 1996, establishing that the 2004 accident could not have caused that condition.

Plaintiff asserts that her medical providers determined that as a result of the fall, the

canaliths[1] in her inner ear broke loose, causing her to suffer from BPPV. To the contrary, none of plaintiff's medical providers opined that the 2004 fall was the cause or onset of plaintiff's BPPV. The medical records, however, irrefutably demonstrate that as early as 1996, plaintiff was diagnosed with vertigo and suffered from the exact same BPPV symptoms that she suffered from after the fall. Defendant's Exhibit Binder tab 118. Plaintiff asserts that BPPV can only be caused from trauma and that since the only evidence of trauma was the fall, the BPPV must have been caused by the fall. Appellee's Brief at. 7. Plaintiff's own treating physician, however, testified that trauma is only one of several possible causes of BPPV. R. 910 at 425. Because plaintiff suffered from BPPV as early as 1996, the fall in 2004 was not the cause of the condition. While plaintiff admits that she experienced different types of dizziness before the fall, she fails to acknowledge that as early as 1996 she experienced the identical BPPV symptoms that she claimed were caused by the accident. Appellee's Brief at 7.

Plaintiff asserts that Schindler refuses to acknowledge that plaintiff's dizziness before the accident was different than the dizziness that she experience afterwards. Schindler did not and has not insisted that all of plaintiff's prior instances of dizziness were necessarily BPPV-related. Schindler simply presented plaintiff's medical background to the jury so the jury had a complete picture of her medical history. Plaintiff, on the other hand, did not rely on or even discuss *any of plaintiff's medical history prior to the accident.*

2. Schindler's Motion for Summary Judgment.

In its Motion for Summary Judgment, Schindler's primary argument was that plaintiff

[1] Plaintiff refers to the crystal in the inner ear as "candaliths." The proper term is *canaliths.*

could not establish causation of her alleged injuries, specifically her BPPV, because no expert had opined, or could opine, as to the cause of that condition. To be clear, Schindler does not rely, as plaintiff asserts, on the fact that plaintiff's expert report failed use the word *causation.* Rather, Schindler focused on the fact that plaintiff's expert's report contained neither an opinion nor any basis regarding the cause of plaintiff's BPPV. Even if he had, plaintiff's expert had no qualifications whatsoever to render such an opinion.

Plaintiff and the trial court inexplicably concluded that because plaintiff's expert report stated: "Benign Positional vertigo [BPV] *as related to* the elevator incident" (emphasis added), the report contained an expert opinion as to the cause of plaintiff's BPPV. That conclusion certainly begs the question as to what might be the basis for such an opinion, if it was intended as such, and in fact the report contains no indication that Dr. Morgan had any opinion as to the cause of that condition. Indeed, although no opinion as to causation appears in his report, in his deposition Dr. Morgan candidly admitted he relied solely on Dr. Siddoway's records ***and the absence of any history of dizziness*** (which itself is incorrect, for the reasons discussed above) to conclude plaintiff even had BPPV as a result of the fall. R. 396-400. Finally, plaintiff's argument that Dr. Morgan's report assigns a 4% disability rating from BPPV "related to the elevator incident," is simply a conclusion as to disability which assumes causation, not an opinion establishing causation. Brief of Appellee at 10; Morgan Report R. 0210.

3. Plaintiff's Affidavit.

Plaintiff offers no legal basis to refute Schindler's argument that a lay person may not opine as to the cause of a medical condition. Plaintiff simply cites to the trial court's

erroneous ruling that plaintiff's affidavit was proper as to the facts surrounding her claim, something Schindler did not dispute. As explained in Schindler's opening brief, while plaintiff may testify as to facts surrounding her symptoms, causation cannot be established by her own testimony but must be established by expert medical testimony.

4. Dr. Morgan's Testimony.

Plaintiff asserts that Schindler offered no testimony to refute Dr. Morgan's conclusions regarding plaintiff's BPPV. Schindler had no such obligation. The burden of proof is on plaintiff to prove her claims, not on Schindler to disprove them. The fundamental problem is that Dr. Morgan has no knowledge, education, experience, skill or expertise sufficient to allow him to opine regarding BPPV. While he may be "highly competent" in performing independent medical evaluations, his competence does not extend to the condition of BPPV, a condition he has never evaluated and for which he knows neither the causes nor the standard diagnostic test. R. 910 p. 402-03, 408. It is simply not possible to testify with expertise that a condition was caused by an event while admitting, as Dr. Morgan did, that you do not know the possible causes of the condition. In fact, the court acknowledged:

> Quite frankly, I thought both experts left a little bit to be desired. **I think they're both outside their fields . . . .**

R. 911 p. 577 (emphasis added).

Plaintiff argues that Schindler's "campaign" against Dr. Morgan is based on Schindler's lack of evidence to support its position. Brief of Appellee at 13. Although plaintiff is wrong and fails to mention that plaintiff's own treating physician acknowledged that as early as 1996 plaintiff suffered from vertigo with the same symptoms as those she

suffered from after the fall, that fact has nothing to do with Dr. Morgan's lack of expertise as to Def. Ex. 118. Dr. Morgan is a sports medicine doctor who admittedly has never diagnosed BPPV, does not know the causes of BPPV, does not know the standard diagnostic test for BPPV and could not determine either the presence or cause of plaintiff's BPPV. R. 396-400; 910 pp. 402-03, 408 and 410. That lack of expertise should have precluded his testimony.

5. Plaintiff's Special Damages.

Plaintiff's Summary of Past Medical Expenses ("Summary") was not shown to a single witness or the jury and plaintiff did not attempt to admit it into evidence until after the close of plaintiff's case. Plaintiff's representation that the Summary was testified to by three medical experts is not true. In fact, not one of those witnesses was shown or testified to that Summary at trial.

Plaintiff first asserts Dr. Morgan's testimony supports her special damages. Dr. Morgan vaguely listed certain medical records in his report and agreed, in his testimony, that he had reviewed those unspecified and incomplete records and that in his opinion, plaintiff's unspecified treatment and the unspecified cost of that treatment, were "reasonable and necessary." Brief of Appellee p. 13. Plaintiff mischaracterizes Dr. Morgan's testimony. Plaintiff's Summary was not referred to or discussed during Dr. Morgan's trial testimony or at any other time during trial. Rather, Dr. Morgan's testimony regarding costs was simply that plaintiff's treatment and costs were reasonable from a community standard, but neither the dollar cost or specific treatment provided were discussed and the records he reviewed, in addition to being incomplete, were never admitted into evidence or disclosed to the jury. R.

910 at 383-84. Dr. Morgan answering yes to plaintiff's general question about the reasonableness of plaintiff's unspecified costs for unspecified treatment does not establish the amount of plaintiff's special damages. [2]

Plaintiff similarly claims that Dr. Amann established plaintiff's damages related to her neck and rib treatment and that Dr. Siddoway established costs for treatment related to BPPV. Brief of Appellee at 13-14. Their testimony, however, did not include any reference to any cost of any treatment and did not include any reference to any exhibit or summary. R. 909 pp. 186-88; R. 910 pp. 447-48. Those treating doctors' general statements of opinion concerning the reasonableness of unspecified treatment, without reference to the cost of that treatment, do not support an award of special damages.

In a futile attempt to salvage her damage claim, plaintiff asserts that damages were established and that no evidence of damages was necessary, because Schindler had information regarding damages prior to trial. *See id.* at 14-15. Of course, the fact that plaintiff provided medical records in discovery or that Schindler prepared summaries based on plaintiff's medical records, does not relieve plaintiff of her burden to establish past and future special damages by presenting ***evidence*** **of them** ***at trial.***

---

[2] Plaintiff insists that the Summary was admitted into evidence. In fact, the court ruled incorrectly in response to Schindler's Motion for Directed Verdict that it understood that Schindler waived objection to the Summary of Past Medical Expenses. However, Schindler's pretrial objection is clear that never happened. R. 911 pp. 576-77; R. R. 482-83. The court also noted erroneously that Schindler did not object to the Summary being admitted into evidence prior to closing. R. 911 p. 576. In fact, Schindler had already objected to the Summary and did not object again to admission of the Summary prior to closing because plaintiff's counsel did not once refer to the Summary at any time during trial. Other than Schindler's pre-trial objection (R. 482-83) and motion for directed verdict, the Summary was not mentioned during the examination of any witness or referred to at trial until plaintiff's counsel purported to use it as the basis for a new summary he wrote during closing, at which time Schindler renewed its objection. R. 911 p. 660.

6. Instruction Regarding Pre-Existing Injury.

Although the evidence at trial established that plaintiff's BPPV was a pre-existing condition, and that the only possible recovery plaintiff could argue would have been for exacerbation of a pre-existing injury, plaintiff refused to admit her condition was pre-existing and never raised a claim for exacerbation of that condition. It was therefore error for the court to instruct the jury on an unasserted claim of exacerbation of a pre-existing condition.

7. Opening and Closing Arguments.

In response to Schindler's assertion regarding plaintiff's counsel's inappropriate remarks during opening and closing arguments, plaintiff attempts to argue that Schindler's counsel also acted inappropriately during trial. No inappropriate comments or behavior were ever objected to at trial by plaintiff's counsel and, not surprisingly, plaintiff does not cite to any instance of Schindler's counsel's alleged "bullying" of witnesses at trial. It was plaintiff's counsel's statements that resulted in an admonishment from the judge, not Schindler's.[3]

Plaintiff asserts that it was proper for counsel to provide a "demonstration" to the jury as to how to calculate future damages based on life expectancy. Plaintiff should not have been permitted to reference anything regarding life expectancy in closing since no evidence to that effect was offered at trial. *See*, Schindler's Brief at 44-45.

Without evidence of life expectancy, an award of future damages is not proper. Although plaintiff asserts incorrectly that Schindler did not object to the comments regarding

---

[3] The number of Schindler's objections at trial are not, as asserted by plaintiff, a poor reflection on Schindler (most of the objections were sustained or warranted discussion from the judge and counsel). Rather, Schindler's objections resulted from plaintiff's counsel's continual errors at trial requiring objection and ruling in order for Schindler to preserve its record for appeal.

life expectancy at trial, Schindler raised the objection to that issue on more than one occasion and the trial court, initially and correctly, argued that future damages could not be awarded absent evidence of life expectancy. R. 911, 584-85.

Finally, plaintiff asserts that because her counsel "took it back" after informing the jury that Schindler had a "legal obligation to bring in a doctor to say Dr. Siddoway is wrong and he didn't" that error was somehow harmless. R. 911 p. 709. Schindler maintains that this statement, along with the plethora of other insulting, improper and inappropriate remarks by plaintiff's counsel, nevertheless constitutes error.

ARGUMENT

I. CAUSATION

A. Motion for Summary Judgment.

Misreading *Orvis v. Johnson,* 2008 UT 2 ¶ 15, 177 P.3d 600, plaintiff asserts that the Court properly denied Schindler's Motion for Summary Judgment because Schindler argued only a lack of evidence to support plaintiff's case. Plaintiff made no such argument below and the court made no such ruling in denying Schindler's motion.

In *Orvis*, the Court established the respective burdens on summary judgment where the moving party filed a motion on a claim on which the non-moving party had the burden:

> A summary judgment movant, on an issue where the non-moving party will bear the burden of proof at trial, may satisfy its burden on summary judgment by showing, by reference to 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' that there is no genuine issue of material fact. Upon such a showing, whether or not supported by additional affirmative factual evidence, the burden then shifts to the *nonmoving* party, who 'may not rest upon the mere allegations or denials of the pleadings,' but 'must set forth specific facts showing that there is a genuine issue for trial.'

Id. at ¶18 (citations omitted) (emphasis original).

Schindler's argument regarding causation focused not on alternative causes of plaintiff's BPPV but rather on the legal requirement that a plaintiff establish causation through expert testimony. Schindler met its burden by demonstrating from the deposition and expert report of plaintiff's expert that plaintiff could not establish causation. The burden then shifted to plaintiff to prove that she could establish causation through the required expert testimony. Plaintiff did not meet that burden. R 0237-38.

Summary judgment is proper where, as here, plaintiff has no evidence that the alleged injuries were caused by the defendant. *Triesault v. Imagination Theaters, Inc.,* 2005 UT App 489 ¶ 16; *Beard v. K.-Mart Corp.,* 200 UT App 285, ¶¶ 12, 16. In this case, Plaintiff was required to establish causation through expert testimony. *Beard v. K.-Mart Corp.,* 200 UT App 285, ¶ 11. Although plaintiff's affidavit set forth her opinion as to the cause of her injuries, that testimony alone cannot establish causation because plaintiff is not an expert. *Id.*

Plaintiff asserts that Dr. Morgan's report established causation because it contained the words "related to" when referring to BPPV. Brief of Appellee at 25. That statement simply presumes causation and provides neither an opinion as to causation nor any basis for such an opinion. Although no "magic words" are necessary to establish causation, plaintiff's reliance on *Redland Soccer Club, Inc. v. Dep't. of Army,* 55 F.3d 827, 852 (3rd Cir. 1995) is misplaced. In *Redland*, while the court stated that medical experts are not required to use certain words to show causation, testimony must establish causation "to a reasonable degree of certainty." *Id.* at 852. As explained by one court:

> It is not necessary for an expert to state an opinion regarding causation with the 'magic' words reasonable degree of medical certainty or probability, . . . an

> expert opinion is to be judged in view of the entirety of the expert's opinion. . . . A physician's opinion must be sufficiently definite and certain that there is a clear connection between the injury and the [alleged negligence].

Flock v. Pepsi Cola Co., 1996 Neb. App. LEXIS 227 No. A-96-071 (November 5, 1996 Nebraska Ct. App.)[4] "When the element of causation involves a complex medical question, as a matter of law, no rational juror can find that a plaintiff has established causation unless the plaintiff has presented expert testimony that there is a reasonable probability that the alleged negligence caused the plaintiff's injuries." *Hudjohn v. S&G Machinery Co.,* 114 P.3d 1141, 1148 (Ore. Ct. App. 2005). Viewing Dr. Morgan's report in its entirety, it provides neither an opinion as to the cause of plaintiff's BPPV nor any basis for such an opinion.

Plaintiff also asserts that causation can be *inferred* from Dr. Morgan's report. Brief of Appellee at 27. First, Dr. Morgan's expert report is required to disclose both his opinions and the basis for his opinions. URCP 26(a)(3). It does not. Second, such an inference, even if it could be made from the words "related to" in Dr. Morgan's report, is not sufficient to establish causation to a reasonable degree of medical certainty. Dr. Morgan testified that his conclusion that the BPPV was related to the fall was based on his incorrect conclusion that plaintiff had not suffered from dizziness before the fall. R. 396-400. In essence, Dr. Morgan's conclusion was that because BPPV symptoms occurred after the fall, the fall must

---

[4] *See also State Office of Risk Management v. Larkins,* 258 S.W.3d 686, 692 (Tx. Ct. App. 10th Cir. 2008)("In the medical context, expert testimony that is not based on reasonable medical probability, but relies instead on possibility, speculation, or surmise, does not assist the jury and cannot support a judgment"); *Bara v. Clarksville Memorial Health Systems, Inc.,* 104 S.W.3d 1, 9 (Tenn. Ct. App. 2002)("[P]roof of causation equating to a 'possibility,' a 'might have,' 'could have,' is not sufficient, as a matter of law to establish the required nexus between the plaintiff's injury and the defendant's tortious conduct by a preponderance of the evidence . . . Causation . . . is a matter of probability, not possibility and . . . must be shown to a reasonable degree of medical certainty.").

have caused the BPPV. Even if it were true (which it is not) that plaintiff suffered from no dizziness before the fall, Dr. Morgan's temporal link between the fall and BPPV is not sufficient to establish causation to a reasonable degree of medical certainty. Indeed, Courts have routinely rejected medical opinions which infer causation from nothing more than the temporal relationship between the alleged negligence and the claimed injury. *See McCollin v. Danek Medical, Inc.*, 50 F. Supp.2d 1119, 1128 (D. Utah 1999).[5]

B. Motion In Limine and Motion For Directed Verdict Based On Lack Of Evidence Of Causation.

Schindler asserts that, first, its Motion in Limine and, second, its Motion for Directed Verdict, should have been granted due to plaintiff's lack of evidence of causation. Relying on *Evans v. Langston,* 2007 UT App 240 ¶ 6, 166 P.3d 621, plaintiff asserts that the trial court properly allowed Dr. Morgan to testify as plaintiff's expert at trial. While trial courts have discretion to determine the competency of an expert witness, experts must be qualified and their testimony must meet the threshold of being useful to the trier of fact in order to be admissible. *See id.* at 624. At trial, however, the court actually recognized Dr. Morgan's lack of expertise, although he had allowed his testimony over Schindler's objection, stating:

> Quite frankly, I thought both experts left a little bit to be desired. I think they're both outside their fields . . . .

R. 911 p. 577.[6]

Evans actually supports Schindler's argument that an expert must testify in his own

---

[5] With respect to the issue of the admissibility of plaintiff's affidavit, even if plaintiff's statements in her affidavit regarding her medical conditions were admissible, such testimony is not sufficient to establish causation which, as set forth above, must be established through expert medical testimony.

[6] Plaintiff did not object to Schindler's expert's qualifications.

field of practice. *See id.* Dr. Morgan was "outside [his] field" in this case. Dr. Morgan has never testified regarding BPPV, has no training, education, skill or knowledge regarding BPPV and did nothing he considered research in connection with this case. R. 910 pp. 402-03, 408, 410. Dr. Morgan does not know the causes of BPPV and does not know the standard test used to diagnose that condition. *See id.* Dr. Morgan could not and did not offer any useful information to assist the trier of fact regarding plaintiff's BPPV.

Plaintiff asserts that Dr. Morgan was properly allowed to testify regarding causation because in his deposition he stated that he relied on Dr. Siddoway's diagnosis of plaintiff's BPPV and opined that the BPPV was caused by the fall because plaintiff had no history of dizziness before the fall so the BPPV must have been caused by the fall. Brief of Appellee at 31; R. 396-400. As explained above, that is not admissible expert testimony. As also discussed above, Dr. Morgan's report contained no opinion regarding causation and no basis for such an opinion. The fact that Schindler was aware of those defects in Dr. Morgan's report does not in any way qualify Dr. Morgan to testify.

Plaintiff cites to *Lamb v. Bangart,* 525 P.2d 602, 607 (Utah 1974), in support of her argument that Dr. Morgan could rely on the records of other medical providers in his report. That case has no application here. *Lamb* involved an agreement for the sale of livestock and the health of the livestock being sold. *See id.* at 606. It involved claims for breach of warranty and fraud. *See id.* at 603. There was no negligence claim or question of causation at issue in that case. In that case the Court held that an expert in a case based on a contract may rely on relevant documents in reaching his opinion. *See id.* at 607-08. The Court did not hold, as plaintiff suggests, that a medical doctor offering an expert medical opinion may rely

solely on another physician's records and diagnosis in reaching his conclusions.

Plaintiff's citation to the Federal Advisory Committee Notes is similarly unavailing. Brief of Appellee at 33. The Notes suggest that a physician in a certain area of practice may rely on statements from other doctors in that same practice area in reaching his expert opinions. The Notes do not suggest that a doctor with no knowledge, training, education, expertise, skill or experience in a certain area may opine in that area based *solely* on another physician's records.

Plaintiff also argues that causation is Dr. Morgan's specialty. Brief of Appellee at 33. To suggest that Dr. Morgan can testify to the cause of *any* medical condition is without basis, particularly here where he testified he did not know the causes of the condition or the test to determine its presence. There is also no merit in plaintiff's argument that a cursory review of a few internet articles, not listed in his report (although he testified that everything he had reviewed was listed in his report) is sufficient for Dr. Morgan to be qualified as an expert in a field of medicine he has never worked in or studied. R. 910 pp 409-10. In fact, Dr. Morgan testified his reading was insignificant and did not qualify as "research." *Id.* p. 409.

Plaintiff relies on *Wheeler v. John Deere Co.,* 935 F2d 1090, 1101 (10th Cir. 1991), for the proposition that a physician who is not a specialist may testify as an expert. Brief of Appellee at 34. Again, that case has no application here. In *Wheeler,* the court held that a psychiatrist, although not a specialist in cognitive psychology, could testify regarding "momentary forgetfulness" and that his lack of specialty went to the weight, not the admissibility of the evidence. *Id.* at 1101. Unlike *Wheeler,* this is not a case where Dr. Morgan is an Ear Nose and Throat physician (the type of physician that treats conditions such as dizziness and vertigo)

but has no specialty in BPPV. Rather, Dr. Morgan is not an ENT at all. Dr. Morgan's specialty is the entirely unrelated area of sports medicine and physical rehabilitation.

Plaintiff's reliance on *Holrook v. Lykes Bros. Steamship Co.,* 80 F.3d 777, 782 (3rd Cir. 1996), is similarly misplaced. In *Holbrook,* the plaintiff alleged that he suffered from mesothelioma, a form of lung cancer, caused from exposure to asbestos. *Id.* at 780. Plaintiff's treating physician and an expert who was a board certified physician in internal and pulmonary medicine testified for the plaintiff. *Id.* The plaintiff's treating physician:

> described the medical procedures undertaken to diagnose and treat [plaintiff]. In great detail, he described the treatment, including his injection of the chemotherapeutic agent fluorouracil into his patient's chest cavity.

Id. at 781. Plaintiff's other expert's practice:

> involve[d] medical treatment, certain procedures such as looking into the lungs of patients. It involves an expertise in reading chest x-rays and understanding pulmonary function tests which are breathing tests. It involves treatment of occupational diseases that affect the chest.

Id. Mesothelioma is a pulmonary disease. On those facts, the appellate court reversed the trial court's exclusion of plaintiff's expert testimony, stating that the trial court is not to exclude expert testimony simply because it may not be the "best." *Id.* at 782. Rather, as long an expert has, pursuant to Rule 702, the necessary "knowledge skill, experience, training or education," in a certain area such as lung function and disease, that person qualifies as an expert. Dr. Morgan's skill, knowledge, training, education and experience solely in the area of sports medicine and physical rehabilitation, does not qualify him, under even the most minimal requirements, to testify as an expert regarding a condition of the inner ear. Finally, in *Paoli R.R. Yard PCB Litigation,* 916 F.2d 829, 856 (3rd Cir. 1990), the expert testimony in question was found admissible because each of the experts, unlike Dr. Morgan, were highly

educated, qualified and experienced in the scientific field that was the subject matter of the case. *See id.* at 856.

Dr. Morgan simply has no qualifications at all to testify as an expert regarding BPPV.[7]

II. MOTION FOR DIRECTED VERDICT ON DAMAGES

Contrary to plaintiff's argument, Schindler did marshall all of the evidence at trial regarding damages. The totality of that evidence, however, was that plaintiff's treatment was reasonable and necessary and that future treatment would be similar to past treatment. Those statements are the **ONLY** evidence that arguably supports plaintiff's claim for damages. Conspicuously absent is any evidence with regard to the *cost* of the past or future treatment.

Plaintiff vaguely refers to a "summary of medical expenses" in several contexts. It is important to differentiate between the Summary of Past Medical Expenses, marked as Exhibit 117 but not admitted into evidence, and the arguments of counsel at closing purportedly summarizing plaintiff's past and future damages. As discussed at length at pages 42 to 45 of Schindler's Brief, and tellingly not addressed in plaintiff's brief, the arguments of plaintiff's counsel are not supported by the Summary of Past Medical Expenses. Indeed, those arguments are not even arguably supported by any evidence.

---

[7] In its opening brief, Schindler argued that plaintiff's treating physicians were improperly allowed to testify as experts at trial concerning the cause of plaintiff's injuries and the reasonableness of her treatment by other doctors. Those doctors were allowed to testify as to matters outside their role as treating physicians even though they were not identified as testifying experts. In fact, even though one treating physician reviewed the records of other doctors only at the request of plaintiff's counsel, and not in connection with plaintiff's treatment, he was allowed to testify to the reasonableness of that care. R. 909 p. 183. Finally, the trial court, having allowed the treating physicians to testify as to causation based on a ruling that their testimony could not establish legal causation which had to be proved through Dr. Morgan, failed to instruct the jury as to that limitation. Plaintiff did not address any of these arguments.

Instead, plaintiff relies solely on an eighty (80) year old Virginia state court decision in arguing that *Schindler* should be found to have waived any objection to plaintiff's argument for damages because Schindler argued from its own summary submitted in rebuttal to plaintiff's summary. Brief of Appellee at 38. Specifically, plaintiff argues that a party waives its right to object to *evidence* when the objecting party itself presents *evidence* of the same character. *See id.* That rule has no application here.

First, Schindler offered no evidence regarding plaintiff's medical expenses. Rather, Schindler made rebuttal argument in closing in response to plaintiff's arguments in closing to which Schindler objected. No written summary used by either counsel at closing was admitted into evidence. Second, even assuming this Court was bound the obscure rule of a Virginia state court almost eighty years ago, and even if the rule was applicable here, it does not apply in the context of plaintiff's failure to present any evidence of damages at trial. The rule is narrow and applies only to objections made to *evidence* presented by a party, not cross-examination or rebuttal argument. *See Pettus v. Gottfried*, 606 S.W.2d 819, 825-26 (Va. 1998).

Plaintiff also states that Schindler improperly relies on *Price-Orem v. Rollins,* 784 P.2d 475 (Utah 1989), in support of its argument that plaintiff failed to present evidence regarding damages. Brief of Appellee at 38. Plaintiff states that much less evidence of damages existed in *Price-Orem* than this case. *See id.* In this case, plaintiff presented **NO** quantitative evidence of damages. Despite plaintiff's repeated attempts to characterize Exhibit 117 as evidence, that information was never introduced, discussed, testified to, or in any way even mentioned during the course of the trial until closing arguments. Plaintiff cites to no legal authority, and indeed there is none, which allows a plaintiff to prove damages without any evidence of

damages introduced at trial. While it is true that an approximation of damages can be presented at trial, plaintiff presented **NO** quantitative evidence of damages. Although plaintiff insists that she presented actual damages at trial, the only testimony at trial regarding damages was that plaintiff's treatment was reasonable and that future treatment would be similar to past treatment. No evidence of cost, duration or frequency of past or future treatment was presented. Schindler's alleged knowledge or notice of damages, the jury's beliefs as to the damages being presented, or the fact that documents regarding damages were allegedly provided to Schindler prior to trial cannot substitute for plaintiff presenting evidence of damages at trial.

Even if plaintiff's Summary were properly admitted into evidence, plaintiff nonetheless failed to establish her damages because the summary was inconsistent with the medical records and the documents supporting the figures on the summary were not provided as required by Utah Rule of Civil Procedure 1006.

> The purpose of the availability requirement of [Rule] 1006 is to give the opposing party an opportunity to verify the reliability and accuracy of the summary and prepare for cross-examination of the material prior to trial. Where a party fails to make materials underlying a summary exhibit available, that exhibit is inadmissible. [Rule] 1006 operates independently of the discovery rules, and the failure to request or obtain the documents during discovery does not negate a party's absolute right to subsequent production of material under Rule 1006, should that material become incorporated in a chart, summary, or calculation.

Robinson v. State Farm Mut. Auto. Ins. Co., 2000 Ida. LEXIS 144 *20 (Idaho Dec. 28, 2000). Even where a party claims that all information underlying and supporting the summary was produced to the opposing party, such production is not sufficient to satisfy the requirements of Rule 1006. A party using a summary at trial is required to provide "all the data necessary

to understand the . . . summary." *Id.* at *22. Based on the purpose of Rule 1006, the party must produce, *in their entirety*, all documents from which the summarized information was extracted so the opposing party may determine the source and understand how the summary was prepared. *See id.* at *23. If a summary of damages is not properly supported with foundation under Rule 1006 and does not sufficiently identify the matters upon which the summary is based, the summary is inadmissible. *Howard v. General Electric Co.*, 1991 Ohio App. LEXIS 4467 *10 (Ohio Ct. App. Sept. 16, 1991)..

Although plaintiff asserts that invoices and other documents were made available to Schindler during the course of this litigation, no such production was made in response to Schindler's objection and neither Schindler nor the trial court had an opportunity to verify that the figures on plaintiff's summary were accurate. Such disclosure is particularly important here since the figures on the summary were not consistent with any medical records in Schindler's possession. Schindler properly objected to the admission of the summary before trial. R. 0482-83. During closing argument, Schindler repeated its objection to plaintiff's Summary because there was no way for Schindler to know the source or accuracy of the figures on the summary. R. 911 at 659. Finally, even the figures on plaintiff's summary exhibit were not consistent with the hand-written summary offered by counsel in closing argument regarding damages.[8]

III. MOTION FOR NEW TRIAL

Plaintiff first argues that Schindler failed to marshall the evidence in challenging the

[8] For example, counsel argued that plaintiff needed four medications in the future, two of which appeared in no medical record or on plaintiff's Summary of Past Medical Expenses. Plaintiff fails to even address this issue, and others, raised by Schindler. App. Brief at 42-43.

ruling of the district court. Brief of Appellee at 36. Even a cursory review of Schindler's opening brief, however, shows that Schindler, in great detail, marshaled the evidence presented at trial. In over 18 pages and eighty paragraphs, Schindler marshalled all of the evidence presented at trial, setting forth the testimony of each witness regarding each injury or subject to which that person testified and all testimony relevant to the issue of damages.

Plaintiff also asserts that Schindler failed to show "substantial" or "prejudicial" error necessitating a new trial. Brief of Appellee at 36. A large award of damages in this case where plaintiff failed to prove causation or damages certainly rises to the level of substantial and prejudicial error.

A. BPPV.

Plaintiff summarily concludes, without any legal citation or argument, that Dr. Morgan's expert testimony was admissible and that his testimony, along with Dr. Siddoway's testimony, was sufficient evidence to support the jury's verdict. Brief of Appellee at 37. Plaintiff fails to acknowledge, however, that Dr. Siddoway, as a treating physician **could not** testify as to legal causation based on the court's ruling prior to trial.

Although there was extensive testimony regarding plaintiff's BPPV presented at trial, none of that testimony established the cause of the BPPV. The jury verdict awarding plaintiff damages for that condition was therefore not supported by the evidence.

B. Pre-Existing Condition.

Plaintiff admits that she never made a claim for aggravation of a pre-existing injury and did not argue that claim at trial. Plaintiff inexplicably asserts that because Schindler asserted that the claimed BPPV condition was pre-existing, the trial court properly instructed

the jury on that issue. Schindler did not, as plaintiff suggests, argue at trial that plaintiff's pre-existing injury was aggravated. Rather, Schindler argued that her injuries pre-existed and therefore could not have been caused by the fall. The court should have instructed the jury on plaintiff's claims—which admittedly did **not** include aggravation of a pre-existing injury.

C. Opening and Closing Arguments.

Plaintiff incorrectly argues that Schindler objected to only two statements during opening and closing arguments. During opening, Schindler objected several times to counsel's improper statements, including those alluding to the wealth of Schindler's expert. R. 908 at p. 49. In addition, Schindler made a general objection to plaintiff's entire opening statement, arguing that counsel was outside the bounds of proper subject matter for opening and indicating that Schindler was attempting not to interrupt counsel or be rude with continual objections. *See id.* During closing arguments, Schindler similarly objected repeatedly to counsel's improper comments. R. 911 at 708, 709, 711, 713, 716.

Plaintiff acknowledges that Utah law does not require that counsel object to each and every improper statement made in opening and closing argument where such conduct constitutes plain error or where the fundamental fairness of the trial is compromised. Brief of Appellee at 42, 44. Courts from other jurisdictions agree in holding that counsel is not required to object to every objectionable comment to preserve the objections for appeal.

> For reversible error to be found in closing argument, the challenged argument must be plainly unwarranted and clearly injurious. The failure to make a contemporaneous objection to argument claimed to be improper . . . does not forfeit the ability to seek a new trial on the basis of improper closing argument where the interest of substantial justice is at stake. The standard for determining whether a jury verdict should be set aside as a result of misconduct of counsel is whether the conduct was such as to impair gravely the calm and dispassionate consideration of the case by the jury.

Rosa v. City of Fort Myers, 2008 U.S. Dist. LEXIS 10427 *6-8 (D. Fl. Feb. 12, 2008) (citations and quotations omitted). Objection to every improper statement in opening or closing is not required where counsel "grossly and persistently abuses his privilege." *Hodorowski v. Rayfield*, 1997 Ohio App. LEXIS 3210 *7-8 (Ohio Ct. App. July 24, 1997).

Plaintiff incorrectly asserts that Schindler "strings" plaintiff's counsel's improper statements together to create some "illusion" about the remarks. To the contrary, Schindler quotes counsel's inappropriate comments in the order stated at trial, leaving out the remainder of the opening and closing arguments not relevant to Schindler's argument.[9]

Plaintiff continues to belabor Schindler's allegedly "unreasonable," "belittling," "dictatorial," "overbearing," and "condescending," behavior at trial. Plaintiff, however, never once objected to any such conduct, nor is there any basis for such claims. Schindler conducted the examination of plaintiff and plaintiff's witnesses in a calm and professional manner, reviewing each relevant medical record and eliciting appropriate testimony. It is no surprise that plaintiff cites to no specific instances of any such conduct in the record.

While plaintiff's counsel acknowledges generally that he made improper statements during opening and closing, plaintiff ignores most of the instances cited by Schindler and addresses only two instances of counsel's comments during opening and closing arguments: 1) statements regarding Schindler's stipulation of liability; and 2) counsel's statements that he "knows Connie." As set forth in five, single-spaced pages of Schindler's opening brief, counsel repeatedly made dozens of inappropriate comments during opening and closing such

[9] The only other way Schindler could have presented counsel's repeated improper comments would be to recite the entire transcript of opening and closing. The Court has in the record the entire transcript for its review.

that those statements, "taken as a whole and in context, . . . rose to the level of invoking passion and prejudice of the jury." R. 0853 (trial court's ruling).

As to Schindler's stipulation to liability, plaintiff argues there was no agreement that the stipulation would not be mentioned. To the contrary, such an agreement was reached by the parties and the trial court cited to that agreement in ruling that it was improper for plaintiff's counsel to disclose that stipulation to the jury. R. 908 p. 15.

Plaintiff attempts to downplay and justify counsel's vouching for her credibility by asserting that his statements were made in response to Schindler's "attacks" and "accusations" regarding her heart condition. [10] If counsel intended to prove plaintiff's credibility he could have done so through evidence admitted at trial. It was improper, however for him to vouch for his client's credibility.[11] Moreover, unfounded attacks on Schindler and its counsel do nothing to prove plaintiff's credibility.

CONCLUSION

For all the forgoing reasons and those previously set forth in Appellant's opening Brief Schindler respectfully requests that the Court set aside the verdict below and direct the entry of judgment in favor of Schindler.

DATED this 8TH day of March, 2010.

VANCOTT, BAGLEY, CORNWALL & McCARTHY

By: _____
Scott M. Lilja

[10] In fact, Schindler made no comments regarding plaintiff's heart condition, except to read the conclusions reached by plaintiff's treating physicians from her medical records.

[11] Counsel's vouching for his client's credibility was not an isolated comment; it was one of dozens made by counsel, the cumulative effect of which was highly prejudicial.

CERTIFICATE OF SERVICE

I hereby certify that I caused two (2) true and correct copies of the within and foregoing **REPLY BRIEF OF APPELLANTS** to be mailed, postage prepaid, this 8TH day of March, 2010, to the following counsel of record:

GRIDLEY WARD & VANDYKE
Erik M. Ward (3380)
Lindy W. VanDyke (8406)
635 25th Street
Ogden, Utah 84401
Telephone: (801) 621-3317
Counsel for Appellees